APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARTHUR NATHANIAL AIKEN, Appellant, vs. JAMES SPALDING, Superintendent, Washington State Penitentiary, and KEN EIKENBERRY, Attorney General, State of Washington, Appellees.	)	NO. 81-3592 D.C. No. Civ. 79-892 OPINION Filed August 17, 1982

Appeal from the United States District Court for the Western District Of Washington
Barbara J. Rothstein, District Judge, Presiding
Argued and Submitted May 6, 1982

BEFORE: GOODWIN and POOLE, Circuit Judges, and EAST,* District Judge

GOODWIN, Circuit Judge

Aiken appeals the dismissal of his habeas corpus petition pursuant to Rule

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*Honorable William G. East, United States District Judge, District of Oregon, sitting by designation.

9(a) of the Rules Governing Section 2254 Cases, 28 U.S.C. foll. § 2254 (1976). Aiken was resentenced in 1973; his habeas petition, however, was not filed until 1979, due to an undenied lack of diligence by earlier counsel. The petition presents claims challenging the voluntariness of Aiken's confession as well as the effects of pretrial publicity.

Rule 9(a) provides:

> "A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the habeas petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred."

The district court found that the state had made no showing that the delay in the filing of the petition had impaired its ability to address the issues raised therein. The district court agreed, however, with the state's allegations that the lapse of time would prejudice the state in its ability to retry Aiken should he obtain habeas corpus relief. The court ruled that these assertions were cognizable within Rule 9(a), and therefore dismissed Aiken's petition.

Rule 9(a) specifically provides that dismissal may be available where the state has been prejudiced in its ability to respond to a habeas petition by reason of the petitioner's unreasonable

delay in filing. The Advisory Committee Note[1] on the rule indicates that the drafters were concerned with the delayed filing of habeas petitions by individuals who had long been on parole or probation or who had served their sentences. Those cases would require difficult factual investigations into long past proceedings. See also IV ABA Standards for Criminal Justice 22-2.4(c) (1980). The State of Washington has not been prejudiced in its ability to respond to Aiken's petition. The state's concern is that trial witnesses have vanished or have forgotten past events and that reprosecution would fail. The question is whether this alone is a valid ground for dismissal under the rule. We hold that it is not.

Rule 9(a) imports into habeas corpus law for the first time the equitable doctrine of laches. Cf. Heflin v. United States, 358 U.S. 415, 420 (1959) (Stewart, J. concurring for five Justices); 17 Wright and Miller, Federal Practice and Procedure, § 4268 at 701 (1978). But Rule 9(a) specifically defines the prejudice to be considered -- prejudice in responding to the petition. The phrase "in its ability to respond to the petition" was an amendment to the Judicial Conference draft of Rule 9(a).

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[1]The history of the drafting of the rule leaves some doubt as to the continued viability of the entire text of the Advisory Committee Note, some of which has been carried over from the former text before it was modified in Congress.

Given the potentially adverse impact of Rule 9(a) on the availability of habeas relief to state petitioners, Rule 9(a) has been liberally construed in favor of petitioners. See, e.g., Davis v. Adult Parole Authority, 610 F.2d 410, 413 (6th Cir. 1979). Liberal construction also avoids a confrontation with the Suspension Clause of Art. I, § 9, of the United States Constitution. Moreover, Congress has indicated its disfavor of dismissals for delay under Rule 9(a) by eliminating from the proposed draft of the rule a rebuttable presumption of prejudice that could be invoked by the state after a delay of five years.[2] See H.Rep. No. 94-1471, 94th Cong., 2d Sess. 4-5, reprinted in 1976 U.S. Code Cong. & Admin. News 2478, 2481.

In statutory construction, the plain, obvious meaning of the language of a statute is to be preferred to a curious or hidden sense. Chandler v. Roudebush, 425 U.S. 840, 848 (1976).

Difficulty in reprosecution is not expressly considered in the text of Rule 9(a), and other courts and commentators have suggested that such difficulty was intentionally excluded. See Lerma v. Estelle, 585 F.2d 1297, 1300, n.3 (5th Cir. 1978), cert. denied, 444 U.S. 848 (1979) (Rubin, J., dissenting)

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[2] In 1980 this court summarily reversed a dismissal of an earlier petition in this case when the district court erroneously relied upon the five-year presumption after it had been stricken. See unpublished memorandum, Aiken v. Spalding, No. 80-3126, (9th Cir. August 5, 1980.)

(petition alleging prison grievance denied for failure to exhaust state administrative remedies). Accord, IV ABA Standards on Criminal Justice, 22-2.4 n.4 (1980); Clinton, "Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts," 63 Iowa Law Review 15 (1977). We have found no case which holds that difficulty in reprosecuting alone is a basis for denying an otherwise meritorious petition.[3] Substantial delay in the filing of a petition has been held not to justify dismissal. See e.g., Hawkins v. Bennett, 423 F.2d 948 (8th Cir. 1970), where a delay of 44 years did not justify dismissal of the petition; and Davis v. Adult Parole Authority, 610 F.2d 410, (14 years). It is the state's ability to respond to the petition, not its ability to retry and convict the petitioner, that is relevant at the current stage of this litigation. 17 Wright & Miller, § 4268 at 701 (1978).

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[3] Black v. Coombe, 506 F. Supp. 626 (SA.D. N.Y. 1981), affirmed without opinion, 672 F.2d 899 (2d Cir. 1981), rejected a habeas petition on the merits, noting in dicta without any analysis of prior law or the history of the rule that the state would have been prejudiced in its ability to retry the petitioner should he have withdrawn his prior guilty plea. The passing reference in dicta in Myers v. State of Wash., 646 F.2d 355, 361-2, n.10 (9th Cir. 1981), vacated and remanded, ___ U.S. ___, 102 S. Ct. 1964 (1982), is likewise inconclusive.

The district court erred in relying on the supposed difficulty the state may encounter in mounting a reprosecution in the event Aiken proves that an illegal interrogation underlay the challenged conviction. The district court must instead address the statutory questions set out in 28 U.S.C. 2254(d). The ultimate issue is whether, in fact, Aiken was denied the constitutional protections which he now claims he was denied.

Because the state has failed to show prejudice within the meaning of Rule 9(a), we vacate the judgment of the district court and remand for further proceedings on the § 2254(d) questions.

Vacated and remanded.

POOLE, Circuit Judge, concurring specially

I concur in the majority opinion because I believe that the result here is dictated by the literal terms of Rule 9, which only permits the state to show prejudice "in its ability to respond to the petition." However, I write separately to express my view that the Rule as interpreted does not conform to the realities of the criminal justice system.

It seems utterly unrealistic to suggest that the state may raise the prejudice it has suffered in responding to the petition caused by petitioner's delay, but that it may not raise the prejudice it will suffer in attempting to retry the underlying charges against him. The principles of equitable estoppel animating Rule 9 apply equally well to the difficulties faced by the state in any retrial as to any problems it may have in responding to petitioner's specific claims. Indeed, as demonstrated

by this case, the difficulties involved in marshalling evidence for a retrial, including dispersal of witnesses, faulty memory and unwillingness to testify may often be more significant than the task of meeting petitioner's specific allegations.

Since Rule 9 does not take into account those difficulties, the situation should be called to the attention of the Judicial Conference of the United States so that it may consider modifying the rule to take into account prejudice on retrial.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CIVIL ACTION FILE NO. C79-892R

ARTHUR AIKEN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	JUDGMENT
	)	
JAMES SPALDING, et al.,	)	
	)	
Defendants.	)	

This action came on for trial (hearing) before the Court, Honorable [Barbara J. Rothstein], United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that respondent's motion to dismiss is GRANTED and petitioner's petition is ordered DISMISSED.

Dated at Seattle, Washington, this 2nd day of September, 1981.

C.R. Kimzey
Deputy Clerk of Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ARTHUR AIKEN,	)	
	)	
Petitioner,	)	NO. C79-892R
	)	
v.	)	ORDER GRANTING
	)	RESPONDENT'S
JAMES SPALDING, et al.,	)	MOTION TO
	)	DISMISS
Respondents.	)	
	)	

THIS MATTER comes before the Court on respondent's motion to dismiss pursuant to Rule 9(a) of the Rules Governing Section 2254 Cases, 28 U.S.C. fol. § 2254. The Court having reviewed the pleadings, the memoranda of the parties, the Report and Recommendation of the United States Magistrate, John L. Weinberg, respondent's objections to the Report and Recommendation, petitioner's reply to respondent's objections, and the balance of the relevant file, now finds and rules as follows.

Rule 9(a) provides:

> A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

Rule 9(a) is based on the equitable doctrine of laches. The petitioner is held to a standard of reasonable

diligence, and the respondent must demonstrate that it has been prejudiced by petitioner's delay. Honeycutt v. Ward, 612 F.2d 36 (2d Cir. 1979). The application of Rule 9(a) must be considered on the facts of each case, based upon the reasonableness of the party's behavior under the circumstances. Baxter v. Estelle, 614 F.2d 1030, 1034 (5th Cir. 1980). Following resentencing in 1973, petitioner Aiken was legally in a position to commence post-conviction habeas proceedings. His petition, however, was not filed until 1979. Petitioner argues that the delay was the result of the failure of his attorney to file the petition. There is no explanation, however, why the attorney's failure to file the petition should excuse Aiken's failure to file the petition as well.

The only permissible justification for delay under Rule 9(a) is lack of knowledge that the claim exists. The Rule provides that prejudice may result in dismissal of the petition unless petitioner shows that he did not know and could not reasonably have discovered the legal grounds for his petition. It is obvious that Aiken knew of his involuntary confession and pretrial publicity claims as early at 1965. His habeas claims are nearly identical to his assignments of error raised in his direct appeals to the Washington Supreme Court; he cannot claim that he did not know his claims existed until 1979. He knew of them in 1965 when he was originally convicted. Aiken filed nothing, contenting himself with the observation that an attorney had assumed the task of preparing his petition. The lack of diligence of his attorney, however, does not excuse his own lack of diligence. A

petitioner cannot sit back for six years without taking any responsibility to see that his claims are presented. It remained Aiken's responsibility to file his petition within a reasonable time period.

The Rule requires not only unreasonable delay but also that the delay work to the detriment of the other party. This question presents the most difficult aspect of this matter because the respondent has argued extensively as to why it would be prejudiced at retrial, but has made no showing that the delay has impaired respondent's ability to address the issues raised by the habeas corpus petition. As noted in the Magistrate's Recommendation and Report, "The language of the rule seems to require a showing that the delay has prejudiced the state 'in its ability to respond to the petition.'" Magistrate's Report, p.4.

The Magistrate observed that the only case where a court indicated that respondent's prejudice in the event of retrial might provide an alternate basis for dismissal under Rule 9(a) is Black v. Coombe, 506 F. Supp. 625 (S.D.N.Y. 1981). The Court of Appeals for the Ninth Circuit recently considered a motion to dismiss under Rule 9(a) in Myers v. State of Washington, 646 F.2d 355, 352-63 (9th Cir. 1981). The Court specifically noted that it expressed no opinion as to whether the state actually had been prejudiced. Apparently the respondents, as in this case, had argued prejudice only insofar as retrial was concerned. Without addressing this particular question, the Court did not reject prejudice at retrial as a ground for consideration. Id. at 362 n.10.

As noted by the Magistrate's Report, the Advisory Committee Notes to Rule 9 of the § 2254 Rules shed little light on this question. Rule 9 of the § 2255 Rules is identical, however, in all material respects to Rule 9 of the § 2254 Rules, and the Advisory Committee Notes to that Rule include:

> Subdivision (a) provides a flexible, equitable time limitation based on laches to prevent movants from withholding their claims so as to prejudice the government both in meeting the allegations of the motion and in any possible retrial. (emphasis added).

There is no reason for construing Rule 9(a) Governing Section 2255 Cases, 28 U.S.C. fol. § 2255 differently than the same rule Governing Section 2254 Cases. The Supreme Court promulgated two parallel 9(a) rules. Elsewhere, the Court has expressed concern that state and federal prisoners seeking habeas relief be treated equally. Francis v. Henderson, 425 U.S. 536 (1975). Because the state has been prejudiced by petitioner's unreasonable delay, the petition is DISMISSED.

Since the issue is likely to be presented to the Appeals Court, the record should be as complete as possible. The respondent's motion to expand the record is therefore GRANTED.

The Clerk of this Court is directed to send uncertified copies of this Order to all counsel of record and to Magistrate Weinberg.

DATED at Seattle, Washington, this 1st day of September, 1981.

s/s Barbara J. Rothstein
BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,	)	
	)	
Respondent,	)	NO. 38592
	)	
v.	)	FILED
	)	OCTOBER 26,
ARTHUR NATHANIEL AIKEN,	)	1967
	)	
Appellant.	)	
	)	

[Excerpt of opinion: 72 Wn.2d 306, 330-347, 434 P.2d 10, 27-36.]

* * *

INTERROGATION OF AIKEN

Our review of the facts and circumstances surrounding the interrogation of the defendant Aiken is invaluably aided by the fact that his interrogation was tape recorded, virtually in its entirety, without the knowledge of either the defendant or the interrogating officers. It proved necessary, however, due to the poor quality of the tape recording at various points in the interrogation to remand this case for a further hearing on the issue of voluntariness, so that our ultimate decision in the case would be based on a record which was complete in every respect. The evidence relative to Aiken's interrogation, therefore, is discosed in the records of both evidentiary hearings held to determine whether the defendant's constitutional rights had been violated in any respect by the taking of his confessions and their admission in evidence at his trial. The

following facts as found by the trial court are undisputed, except as hereinafter noted.

After Aiken's apprehension in Blaine, Washington, by the border patrol at 4:19 p.m. on April 25, 1965, he was placed under arrest by a Blaine city policeman for carrying a concealed weapon (a fully loaded .25 automatic) and transported to the Whatcom County jail at Bellingham. The officers of the border patrol, state patrol, city of Blaine, and Whatcom County sheriff's office, all testified that from the time of his apprehension, Aiken's attitude was sullen and quiet and he held his head down. In fact, during his entire detention in Bellingham, pending his transport to Seattle, Aiken only asked one question concerning his detention, remaining silent even to the extent of refusing to answer routine identification questions by the booking officer.

At approximately 10 p.m. that evening, Detective John Leitch of the Seattle Police Department and Detective Sergeant Frank Chase of the King County sheriff's office arrived in Bellingham to drive Aiken to Seattle. At that time, the police officers advised him that he did not have to make any statement to them, that he had a right to an attorney before making any statement, and that anything he did say could be used against him in a court of law. Detective Leitch asked Aiken if he understood his rights, and the defendant nodded and said "yes." The defendant was very quiet. He had his head down and his attitude was surly and cool.

En route to Seattle, Detective Leitch inquired of the defendant whether he, as a member of the military, was

familiar with article 31 of the Uniform Code of Military Justice, which prohibits compulsory self-incrimination. The defendant replied that he was familiar with it. The article in pertinent part reads as follows:

> Art. 31. Compulsory self-incrimination prohibited
>
> (b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

Detective Leitch further advised Aiken that he was being held on a charge of homicide and robbery. The defendant denied any involvement and the officers did not discuss the matter further.

Upon their arrival in Seattle, at approximately midnight, the police officers took Aiken to an interrogation room located on the 10th floor of the County-City Building. At 12:20 a.m., April 26, 1965, an interrogation began there, which is recorded on exhibit 11, the first tape recording, and prior thereto the defendant was again cautioned by Detective Chase of his constitutional rights as enumerated. This third warning was corroborated by Detective Everett Mullen of the Seattle Police Department, who participated in the interrogation, and is admitted by Aiken as having been given to him.

During the conversation that followed between Sergeant Chase,

Detective Mullen and the defendant Aiken, the defendant had his head lowered, mumbled his words and was difficult to understand. The interview room is not soundproof, and during the conversation the detectives heard, and the recording discloses, several noises from outside the room, including a laundry running on the floor above, a swinging gate just outside the interview room, and traffic noises outside the window.

During the interrogation, Aiken read a statement by the defendant Wheat (exhibit No. 3) pertaining to the Wolf homicide as charged in count 2 of the information, wherein Wheat accused Aiken of the callous slaying of the victim, while he was on his knees praying. Aiken insisted that the statement was a counterfeit, and that Wheat was lying.

Shortly thereafter, at 1 a.m., Chief of Detectives Thomas Nault entered the interview room. Chief Nault advised the defendant that further evidence had been received from Airman Brown, a friend of Aiken, which indicated that the murder weapon was Aiken's. Nault corroborated the fact that Wheat had given the statement read by Aiken, and that they wanted to give Aiken the opportunity to give his side of the story before he was charged with murder; that if Wheat was lying, they wanted to know it.

Aiken then requested that Wheat be brought down to the room to verify the statement. The request was granted, and Wheat was brought to the interview room. While standing in front of Wheat, Aiken asked him if he had given the Wolf statement, and Wheat acknowledged that he had. In response to Wheat's refusal to say the statement wasn't true, Aiken

exclaimed the statement was a lie and he would tell the officers what really happened.

Aiken immediately answered questions concerning the Wolf homicide. At 1:15 a.m. he was asked if he wished to give a statement of his version and he replied that he would.

Upon this confrontation with Wheat, the defendant Aiken ceased to mumble his words, spoke positively, and held his head up. He appeared to be upset and excited.

At 1:20 a.m. Sergeant Chase and Detective Leitch began a conversation with Aiken in the interview room concerning the Harp homicide as charged in count 3 of the information. This conversation was recorded on exhibit 12 until 2:20 a.m. Both detectives and Aiken were aware that this conversation was being taped.

At the outset of said interrogation, Sergeant Chase admonished the defendant Aiken of his right not to make any statement, that he had a right to an attorney before making any statement, and that any statement given by him could be used as evidence in a court of law. Aiken stated that he understood this, and when asked whether he still wished to give a statement, he replied, "yes."

The Fair and Wolf homicides, as charged in counts 1 and 2, were being investigated by the Seattle Police Department, and the Harp homicide was being investigated by the King County sheriff's office. It was the intention of the investigating officers to obtain separate statements for each homicide. During the conversation, as recorded on exhibit 12, Sergeant Chase began writing exhibit 5, relative to the Harp

homicide. Sergeant Chase, however, did not complete exhibit 5 during the recording, since Aiken talked not only about the Harp homicide, but also the Fair and Wolf homicides. After the recorded conversation was ended, exhibit 5 was completed.

At approximately 3 a.m. on April 26, 1965, Detectives Mullen and Orin Church interrogated Aiken in the interview room concerning the Fair homicide as charged in count 1 of the information. At the outset of the interrogation, Aiken was advised by Detective Mullen that he did not have to say anything, that he had a right to see an attorney before making any statement, and that anything he did say could be used against him in a court of law. The defendant Aiken stated that he understood these rights. Mullen then asked the defendant if he desired to use the telephone. This offer was not accepted.

During this interrogation by Detectives Mullen and Church, Aiken talked about his participation in the Fair homicide. At this time, exhibit 7 was written by Detective Mullen and signed by Aiken. All conversations with Aiken ceased shortly before 5 a.m., and he was placed in a cell at the King County jail.

Aiken was not questioned further until 10 a.m. on April 26, 1965, when Detectives Richard Schoener and Dana Shearn interrogated Aiken in the county jail. Detectives Schoener and Shearn had never met Aiken before, and were not present in the King County courthouse during the prior questioning of Aiken. Prior to the interrogation, Detective Schoener advised Aiken that he did not have to say anything, that he had a

right to an attorney before making any statement, and that anything he said could be used against him in a court of law. Aiken stated that he understood this admonition. Detective Schoener proceeded to write exhibit 14, which was signed by Aiken. During this interrogation, Aiken drew the sketch of the Wolf homicide scene and signed it. The interrogation concluded at approximately 11:20 a.m.

Aiken maintained in the original pretrial hearing that he, repeatedly, requested counsel at various times; but that all of the officers, including the jailor at the county jail in Bellingham, Detective Leitch, and the two interrogating officers, completely ignored any and all requests made by him.

The trial court at the first hearing was aware that such a request could have been made, considering that at numerous places on the tapes, Aiken's answers could not be heard; and that throughout the interrogation, at least prior to the confrontation, he spoke with his head down and indistinctly.

The trial court expressly noted in finding of disputed fact 1, however, that Officer John Leitch and the officers, who questioned Aiken in Seattle during the period in which he stated he requested counsel, each testified that, although it was possible, they did not, at any time, hear Aiken request an attorney, or to contact any person, other than Wheat. The arresting officer at Blaine and the Whatcom County jailor also testified that Aiken, in their presence, was extremely quiet and sullen and made no request for counsel at any time.

Believing this testimony, which was fully supported by the record, and not

discovering anything on the tapes to the contrary, the trial court entered conclusions as to this disputed fact by holding that Aiken did not, at any time, at least in words audible to any of the officers talking to him, request an attorney. (Conclusion of disputed fact 1--pretrial conference.)

Upon this court's discovery of what appeared on the tape (exhibit 11) to be a request for counsel and pursuant to our order of May 5, 1967, and the procedure outlined therein, the trial court redetermined the issue. It concluded that Aiken had made a request for counsel on at least two occasions, after reading Wheat's statement of the Wolf homicide and before the confrontation. The transcription by the trial court reads as follows:

> Q. You tell us the truth, then, if this is a lie. (A. I'd like to see an attorney, I won't mess around with you.) [1]Q. This matches all the physical evidence. The guy's not lying. A. He is lying. Q. We've got the physical evidence at the scene. A. He is lying. Q. What's he lying about? What's he lying about? Tell us what he's lying about. (A. I want to see an attorney.[2]) Q. Well what's he lying about? A. He is lying. Q. Where? Show us where he is lying in (t)here. A. . . .[3] Q. Just one place, one place in it he's lying. Just one place. Just one place that he's lying. A. . . . .[4]
>
> [1]and [2]The trial court reporter's transcript indicates that the response at this point is unintelligible. However, as above indicated monitoring of the tape would

appear to indicate the above bracketed statements.

[3]The tape reveals that Aiken's answer at about this point is difficult to apprehend. However, again, careful monitoring suggests the possibility of a request for counsel at this point.

[4]The tape at this point likewise reveals Aiken's answer to be somewhat indistinct. However, again, careful monitoring indicates either a fourth request for counsel or the possible statement: "I don't care to say anything else to that."

As in the first hearing, the trial court found that Aiken's requests to see an attorney, or indication that he desired to remain silent, were inaudible to the interrogating officers and were not heard by them. Due to the importance of this disputed finding of fact, we have set it out below in its entirety, including the reasons given to support the trial court's conclusions. The finding reads:

> 2. That said requests were inaudible to the interrogating officers and were not heard by them. The officers did not at any time hear the defendant Aiken request an attorney, or that he did not want to say anything. The officers did not ignore any request for an attorney or a desire to remain silent, for they heard no such requests and could not act upon a word or statement they did not hear. This conclusion is based upon the following:
>
> a. All law enforcement officials who had contact with the defendant Aiken testified that they at no time heard an audible or

intelligent request for an attorney from the defendant Aiken. If they had heard an audible or intelligent request or a desire to remain silent, the interrogation would have stopped;

b. Prior to the confrontation with the defendant Wheat the defendant Aiken held his head down; he spoke softly, slurred his words, and he let his voice trail off. This was confirmed when the defendant Aiken testified before the Court during the original pretrial hearing. During his testimony he slurred his words, spoke softly with an accent difficult to understand.

c. The interview room in which the questioning of defendant Aiken occurred was not soundproof and numerous noises could be heard by the interrogating officers which seriously interfered with their understanding of defendant Aiken's responses;

d. During the interview recorded on Exhibit No. 11 the interrogating officers were not sitting next to the defendant Aiken. Instead, Sergeant Chase was across the room behind a desk and Detective Mullen was sitting in the middle of the room as shown on Exhibit Nos. 140 and 141, and defendant Aiken was not close to the microphone.

e. The trial Court and counsel experienced great difficulty in determining whether or not a request for an attorney could

> be heard on Exhibit No. 11. The Court's belief that the defendant Aiken requested an attorney on possibly two occasions is based upon having heard Exhibit No. 11 played several times on the original tape machine and a new tape recorder. Many of the defendant's answer were on the threshold of intelligibility. With the difficult time the Court and counsel have had in trying to hear what the defendant Aiken said, the Court does not believe that the interrogating officers heard, nor could possibly under all the circumstances have heard, any request for an attorney or desire to remain silent.

Aiken contends it is obvious from the continuity of questions and answers that the interrogators were listening and heard Aiken's requests for an attorney, especially considering the expression and tone of voice of the interrogator after Aiken's second attempt to exercise his privilege.

[4] This factual determination was peculiarly a matter for the trial court to consider and having resolved this argument adversely to the defendant, we cannot now retry questions of fact involving substitution of our judgment for that of the trial court, where the finding attacked is based upon conflicting evidence. Haynes v. Washington, 378 U.S. 503, 515, 516, 10 L. Ed. 2d 513, 83 Sup. Ct. 1336 (1963). The trial court chose to believe the several officers who testified that if such a request were made, it was unintelligible and not

heard by them, and we have carefully reviewed this factual determination. We are satisfied that its findings are in no way distorted and are fully supported by the record and therefore hold that the trial court properly found that Aiken made at least two requests for an attorney; but that such requests, when made, were, in fact, unintelligible and not heard by the officers interrogating him.

The state contends that irrespective of the uncommunicated request or desire of Aiken to have counsel or remain silent, these rights were knowingly and intelligently waived prior to giving his confessions, by his conduct, observable demeanor and articulations.

The trial court had no difficulty in finding that any requests by Aiken for an attorney or any desire on his part to remain silent were later waived after his confrontation with the defendant Wheat. Aiken does not assign error to or dispute any of the facts relied on by the trial court in finding waiver; but he does contend that this conclusion, under the circumstances, was improperly entered as a matter of law. To better understand the reasoning of the court, we have set out its conclusions as follows:

CONCLUSIONS AS TO THE VOLUNTARY NATURE OF AIKEN'S ADMISSIONS AND CONFESSIONS.

As heretofore stated, any requests for an attorney or desire to remain silent by defendant Aiken were inaudible and unintelligible to the interrogating officers. Notwithstanding said requests the defendant Aiken by his observable demeanor and actions knowingly and intentionally waived his right to counsel flowing from such requests, and his oral

and written statements were given freely and voluntarily. The Court bases this conclusion upon the following findings and reasons:

a. That the defendant Wheat personally verified his statement (Exhibit No. 3) concerning the Wolf homicide at the request of the defendant Aiken. It was this verification and the desire to refute Wheat's statement that caused the defendant Aiken to tell his side of the story as set forth in Exhibit Nos. 5, 7 and 14; (Italics ours.)

b. That within five minutes after the confrontation between Wheat and Aiken, defendant Aiken was again advised of his right to counsel and that anything he did say could be used against him in a court of law. Understanding these rights, he clearly showed a desire to give a statement. He then proceeded to give an oral statement concerning not only one but the three homicides;

c. That prior to the confrontation the defendant Aiken was sullen, quiet and withdrawn. Immediately thereafter his attitude was positive and he became alert. He spoke clearly and he appeared to be upset or angry with the defendant Wheat;

d. That the defendant Aiken was advised at least three times prior to the beginning of Exhibit No. 12 and the signing of Exhibit No. 5 that he had a right to counsel, that he had a right to remain silent, and that anything he said could be used against him in a court of law. In addition, he was advised of his rights under Article 31 of the Uniform Code of Military Justice. As demonstrated

by his testimony during the original pretrial hearing, the defendant Aiken is not dumb or illiterate by any means or standards. He is not a Danny Escobedo, who was an illiterate. He has a high school education and has been trained in the military. He was well aware of these rights which had been explained to him prior to and throughout the interrogation, and knew that he did not need to answer any questions after the confrontation with the defendant Wheat. (Italics ours.)

e. That prior to the signing of Exhibit No. 7 the defendant Aiken was again advised of his right to an attorney, to remain silent, and that anything he said could be used against him in a court of law. On this occasion he was offered the opportunity to use a telephone and declined such use. While aware of his rights he proceeded to sign Exhibit No. 7 without any hestitation and without any request for assistance from anyone;

f. That defendant Aiken was given another opportunity to request counsel at 10:00 A.M. on April 26, 1965. At that time Sergent Schoener and former Detective Dana Shearn advised him of his right to remain silent, his right to counsel, and the fact that anything he said could be used against him in a court of law. Again defendant Aiken proceeded to give a statement concerning the Wolf homicide and to draw a sketch of the homicide scene, demonstrating his knowledge of the area. It is to be noted that the interrogating officers, Sergeant Schoener and former Detective Shearn, were not present

in the King County Courthouse prior to 9:00 A.M. on April 26, 1965, when the defendant Aiken signed Exhibits Nos. 5 and 7. They could not have possibly known of any request for counsel by the defendant Aiken;

g. That the Court believes the testimony of the several officers who stated that they did not at any time hear the defendant Aiken make a request for an attorney, to make a phone call, or express a desire to remain silent. That the Court believes that if such requests were made or attempted to be made by defendant Aiken, such requests were inaudible and unintelligible to such officers. That the Court further concludes that all statements made by defendant Aiken were freely and voluntairly given after having been fully and amply advised of his constitutional rights to an attorney and to remain silent. (Italics ours.)

Aiken argues there could be no knowing and intelligent waiver under these circumstances; since he believed the police officers did hear his requests for an attorney, and could only conclude that by not receiving one, his requests had been ignored; that as a result, his later incriminations were not admissible in evidence as involuntarily given due to police threats that he would be charged on every single count if he didn't cooperate.

[5] If Aiken's attempts to exercise his constutitional rights were frustrated by improper police tactics in ignoring his requests or by duress, we would agree with the defendant that his statements should not have been received in

evidence for consideration by the jury. The constitution enjoins all unfair interrogation practices which are likely to exert such pressures upon an individual so as to disable him from making a free and rational choice whether to speak to the police. See Miranda, supra, at 460; Escobedo v. Illinois, supra, Malloy v. Hogan, 378 U.S. 1, 12 L. Ed. 2d 653, 84 Sup. Ct. 1489 (1964). See also State v. Kelter, 71 Wn.2d 52, 426 P.2d 500 (1967).

But the record from both hearings in the present case does not support the defendant's argument. In addition to finding that Aiken's requests were unintelligible, the trial court expressly found that his admissions and confessions were not occasioned by any promises, threats or statements made to him by any of the questioning officers, but that he gave them solely to refute Wheat's accusations. The police officers, therefore, not hearing Aiken's requests for legal assistance or desire to remain silent, and unable to act on a word or statement they did not hear, did not coerce the defendant into making his admissions and confessions, or exert such pressure on him that he was unable to make a free and rational choice whether to speak to the police. Malloy, id. at 7.

We agree with the trial court that it was not a compelling atmosphere of an in-custody interrogation that caused Aiken to speak; but an independent decision on his part to refrain from further exercising his right to silence without the advice of counsel, when the self-inspired confrontation with Wheat failed in its purpose of bringing about a repudiation of Wheat's accusation that

he (Aiken) was responsible for the slaying of Daniel Wolf. The trial court properly concluded on undisputed facts that Aiken thereafter freely and voluntarily gave his three written statements admitting complicity and accusing Wheat of the murders.

We hold that Aiken's abdication of his constitutional privilege to remain silent--the choice on his part to speak to police without counsel, was made knowingly and intelligently after he had been apprised of his rights and admittedly understood that he had the right to consult with an attorney before incriminating himself.

The defendant argues, however, that there could be no knowing and intelligent waiver of any of his constitutional rights; since he was not effectively warned, and consequently could not know, that this admission of complicity in the crimes would expose him to charges of murder and the possible death penalty, just as if he had fired the fatal bullets.

The record discloses Aiken was informed by the police before any interrogation took place that the charges he faced were murder and robbery, and there is no clear and conclusive evidence that would indicate that the defendant was misinformed, in any respect, concerning the gravity of his offense or punishment he might receive should he be found guilty.

The further finding of the trial court was that the defendant had been effectively warned at least five times orally and fully understood from his previous experiences that any incriminations he made could be used against him in a court of law.

Considering these facts, we hold, as we have with the defendant Wheat, that a defendant, so warned, is put on notice of the very situation complained of. Aiken, understanding that anything he said could be used as evidence against him in court, may not now complain he incriminated himself out of ignorances of the law. See pp.382, 329.

Aiken contends that regardless of the findings and conslusions reached by the trial court at the supplemental hearing, he has the right, at this time, to present to a jury at a new trial all of the now available evidence bearing on the issue of the voluntariness of his confessions. The defendant's argument, that he has such a right, is bottomed on our recent decision in State v. Collins, 69 Wn.2d 627, 419 P.2d 590 (1966), wherein we held, with respect to RPPP 101.20W, supra, that a defendant "may present to the jury de novo all of the detailed facts connected with the giving of the confession upon which an assertion of involuntariness may be claimed to depend, and if the jury believes the confession to be involuntary, they may disregard it."

[6] This rule goes further than the minimum federal standards of due process required for testing the voluntariness of confessions. In Jackson v. Denno, 378 U.S. 368, 12 L. Ed. 2d 908, 84 Sup. Ct. 1774 (1964), the United States Supreme Court held that this determination by a jury is constitutionally inadequate by reason of the risk of its confusing the truth of the confession with its voluntariness; that to insure reliable results a pretrial evidentiary hearing is required; and that thereafter redetermination of the issue by the

jury, while not improper, is not necessary. 378 U.S. at 380, 385. The court concluded that a new trial wasn't necessary where the jury alone had passed on the voluntariness of Jackson's confession and remanded the case for an evidentiary hearing exclusively before the state trial court. The court stated:

> At the very least, Townsend v. Sain, 372 U.S. 293, would require a full evidentiary hearing to determine the factual context in which Jackson's confession was given.
>
> . . . .
>
> It does not follow, however, that Jackson is automatically entitled to a complete new trial including a retrial of the issue of guilt or innocence. . . . [I]f at the conclusion of such an evidentiary hearing in the state court on the coercion issue, it is determined that Jackson's confession was voluntarily given, admissible in evidence, and properly to be considered by the jury, we see no constitutional necessity at that point for proceeding with a new trial, for Jackson has already been tried by a jury with the confession placed before it and has been found guilty. True, the jury in the first trial was permitted to deal with the issue of voluntariness and we do not know whether the conviction rested upon the confession; but if it did, there is no constitutional prejudice to Jackson from the New York procedure if the confession is now properly found to be voluntary and therefore admissible. If the jury relied upon it, it was entitled to do so. Of course, if the state court, at an

evidentiary hearing, redetermines the facts and decides that Jackson's confession was involuntary, there must be a new trial on guilt or innocence without the confession's being admitted in evidence.

The rule announced above applies with equal force to claims of involuntariness based on new evidence. Townsend v. Sain, 372 U.S. 293, 9 L. Ed. 2d 770, 83 Sup. Ct. 745 (1963).

We therefore hold that the evidentiary hearing before the trial judge alone on the issue of voluntariness of Aiken's confessions was sufficient to meet the minimum requirements of due process under the federal constitutional standards.

[7] However, under our state procedure, RPPP 101.20W, supra, State v. Collins, supra, if the trial court has found the confession to be voluntary as a matter of law, and admissibility is not precluded by an exclusionary rule affecting the defendant's procedural safeguards, Escobedo, supra; Massiah, supra, the jury may redetermine the question of voluntariness as a matter of fact, as it relates to the weight and credibility to be given the confession. The jury may not, however, disregard a confession by measuring it against the foregoing legal tests of due process and reject the confession, as a judge would, if the tests are not fulfilled. See 3 Wigmore on Evidence, § 861, p. 347 (Supp. 1964 at 135).

In the present case the jury, after assessing the weight and credibility of the confessions at the trial, has already found that they were voluntarily given; and we are satisfied that the legitimate effect of the new evidence

would not change this determination; since the defendant, as a matter of law, waived his constitutional rights before making the challenged statements.

We have heretofore held from the trial court's undisputed findings, that what really caused Aiken to admit his complicity in the slayings, was not the alleged denial of his constitutional rights by interrogating officers; but was an independent decision on his part, after the face-to-face confrontation with Wheat, to proceed without counsel and make a statement rebutting Wheat's accusation of him as the triggerman in the Wolf slaying.

In the face of these findings, reasonable minds could not differ in concluding that the weight and credibility of Aiken's confessions were not affected by the alleged earlier denial of his procedural safeguards.

We hold, therefore, that reconsideration of the evidence by the jury at this time is not necessitated, and that the defendant Aiken is not denied due process by this determination.

Aiken contends the trial court erred in failing to grant him a reasonable opportunity to review the tape recording; that by only allowing the tape to be played once during the course of trial in a crowded courtroom, the requests for counsel were not appreciated by the defendant or his attorneys.

[8] The record shows that after motions to produce were made by the defendant, the trial court ordered the tapes be impounded and placed in the possession of the court reporter, as an impartial party. Due to their unintelligibility the trial court had the court

reporter transcribe the recordings and make copies available for the convenience of counsel. This was a proper precautionary measure followed by the trial court for the preservation of this important evidence.

The record further shows copies of the transcription were given to counsel and in addition the court allowed the playing of the tapes in open court during the pretrial hearing. The procedure followed by the trial court in the production and presentation of these tapes in evidence was within the trial court's discretion. State v. Thompson, 54 Wn.2d 100, 338 P.2d 319 (1959); State v. Robinson, 61 Wn.2d 107, 377 P.2d 248 (1962); State v. Mesaros, 62 Wn.2d 579, 384 P.2d 372 (1963); State v. Gilman 63 Wn.2d 7, 385 P.2d 369 (1963); State v. Peele, 67 Wn.2d 893, 410 P.2d 599 (1966). Considering the measures taken by the trial court, and the failure of counsel after the playing of the tape, to request a second playing or any other measure to aid in deciphering the unintelligible portions, we do not find this procedure followed by the trial court to be an abuse of discretion.

REMAINING ASSIGNMENTS OF ERROR

Defendant Aiken contends that the standards for voluntariness of admissions or confessions contained in the court's instruction No. 24 were incorrect, and that the instruction was erroneously given. We disagree. The instruction adequately advised the jury that confessions and admissions, in order to be considered reliable, must be freely and voluntarily given and not caused by duress or fear produced by threats. This is particularly spelled out when instruction No. 24 is

considered in connection with the following special interrogatories which were answerd by the jury:

Interrogatory No. 1:
Were any of the alleged oral or written admissions or confessions made by defendant Aiken caused by duress or fear produced by threats?
Answer: No (yes or No)

Interrogatory No. 2:
Were any of said alleged admissions or confessions made by defendant Aiken obtained by means of inducements or promises?
Answer: No (Yes or No)

Interrogatory No. 3:
Were all of said alleged admissions or confessions freely and voluntarily made by defendant Aiken?
Answer: Yes (Yes or No)

Interrogatory No. 4:
In arriving at your verdict did you consider said alleged admissions or confessions?
Answer: Yes (Yes or No)

[9] Wheat and Aiken both contend the trial court erred in denying their motions for a change of venue by reason of prejudicial pretrial publicity. We disagree. The record indicates that the news media exercised remarkable restraint to avoid prejudicing the right of the defendants to a fair trial by reason of pretrial publicity. We find nothing in the record as to the publication of incriminating statements made by the defendants that were disclosed prior to trial when motions for separate

trials were interposed, and when applications for review of the order denying the motions were made to this court, which could have then been published. We are satisfied that the defendants were not denied a fair trial by reason of the pretrial publicity, and that the motions for change of venue were properly denied.

* * *

APPENDIX D

Rule 9(a), Rules Governing Section 2254 Proceedings 28 USC foll. § 2254

Historical Note

1976 Amendment. Subsec. (1) Pub.L. 94-426, § 2(7), struck out provision which established a rebuttal presumption of prejudice to the state if the petition was filed more than five years after conviction and started the running of the five year period, where a petition challenged the validity of an action after conviction, from the time of the order of such action.

Subsec. (b) Pub.L. 94-426, § 2(8), substituted "constituted an abuse of the writ" for "is not excusable".

Legislative History. For legislative history and purpose of Pub.L. 94-426, see 1976 U.S.Code Cong. and Adm. News, p. 2478.

Advisory Committee Note

This rule is intended to minimize abuse of the writ of habeas corpus by limiting the right to assert stale claims and to file multiple petitions. Subdivision (a) deals with the delayed petition. Subdivision (b) deals with the second or successive petition.

Subdivision (a) provides that a petition attacking the judgment of a state court may be dismissed on the grounds of delay if the petitioner knew or should have known of the existence of the grounds he is presently asserting in the petition and the delay has resulted in the state being prejudiced in its ability to respond to the petition. If the delay is more than five years after the

judgment of conviction, prejudice is presumed, although this presumption is rebuttable by the petitioner. Otherwise, the state has the burden of showing such prejudice.

The assertion of stale claims is a problem which is not likely to decrease in frequency. Following the decisions in Jones v. Cunningham, 371 U.S. 236 (1963), and Benson v. California, 328 F.2d 159 (9th Cir. 1964), the concept of custody expanded greatly, lengthening the time period during which a habeas corpus petition may be filed. The petitioner who is not unconditionally discharged may be on parole or probation for many years. He may at some date, perhaps ten or fifteen years after conviction, decide to challenge the state court judgment. The grounds most often troublesome to the courts are ineffective counsel, denial of right of appeal, plea of guilty unlawfully induced, use of a coerced confession, and illegally constituted jury. The latter four grounds are often interlocked with the allegation of ineffective counsel. When they are asserted after the passage of many years, both the attorney for the defendant and the state have difficulty in ascertaining what the facts are. It often develops that the defense attorney has little or no recollection as to what took place and that many of the participants in the trial are dead or their whereabouts unknown. The court reporter's notes may have been lost or destroyed, thus eliminating any exact record of what transpired. If the case was decided on a guilty plea, even if the record is intact, it may not satisfactorily reveal the extent of the defense attorney's

efforts in behalf of the petitioner. As a consequence, there is obvious difficulty in investigating petitioner's allegations.

The interest of both the petitioner and the government can best be served if claims are raised while the evidence is still fresh. The American Bar Association has recognized the interest of the state in protecting itself against stale claims by limiting the right to raise such claims after completion of a sentence imposed pursuant to a challenged judgment. See ABA Standards Relating to Post-Conviction Remedies § 2.4(c), p. 45 (Approved Draft, 1968). Subdivision (a) is not limited to those who have completed their sentence. Its reach is broader, extending to all instances where delay by the petitioner has prejudiced the state, subject to the qualifications and conditions contained in the subdivision.

In McMann v. Richardson, 397 U.S. 759 (1970), the court made reference to the issue of the stale claim:

> What is at stake in this phase of the case is not the integrity of the state convictions obtained on guilty pleas, but whether, years later, defendants must be permitted to withdraw their pleas, which were perfectly valid when made, and be given another choice between admitting their guilt and putting the State to its proof. [Emphasis added.]
>
> 397 U.S. at 773

The court refused to allow this, intimating its dislike of collateral attacks on sentences long since imposed which disrupt the state's interest in

finality of convictions which were constitutionally valid when obtained.

Subdivision (a) is not a statute of limitations. Rather, the limitation is based on the equitable doctrine of laches. "Laches is such delay in enforcing one's rights as works disadvantage to another." 30A C.J.S. Equity § 112, p. 19. Also, the language of the subdivision, "a petition may be dismissed" [emphasis added], is permissive rather than mandatory. This clearly allows the court which is considering the petition to use discretion in assessing the equities of the particular situation.

The use of a flexible rule analogous to laches to bar the assertion of stale claims is suggested in ABA Standards Relating to Post-Conviction Remedies § 2.4, commentary at 48 (Approved Draft, 1968). Additionally, in Fay v. Noia, 372 U.S. 391 (1963), the Supreme Court noted:

> Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles. United States ex rel. Smith v. Baldi, 344 U.S. 561, 573 (dissenting opinion). Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.

372 U.S. at 438

Finally, the doctrine of laches has ben applied with reference to another post-conviction remedy, the writ of coram nobis. See 24 C.J.S. Criminal Law § 1606 (25), p. 779.

The standard used for determining if the petitioner shall be barred from asserting his claim is consistent with

that used in laches provisions generally. The petitioner is held to a standard of reasonable diligence. Any inference or presumption arising by reason of the failure to attack collaterally a conviction may be disregarded where (1) there has been a change of law or fact (new evidence) or (2) where the court, in the interest of justice, feels that the collateral attack should be entertained and the prisoner makes a proper showing as to why he has not asserted a particulr ground for relief.

Subdivision (a) establishes the presumption that the passage of more than five years from the time of the judgment of conviction to the time of filing a habeas petition is prejudicial to the state. "Presumption" has the meaning given it by Fed.R.Evid. 301. The prisoner has "the burden of going forward with evidence to rebut or meet the presumption" that the state has not been prejudiced by the passage of a substantial period of time. This does not impose too heavy a burden on the petitioner. He usually knows what persons are important to the issue of whether the state has been prejudiced. Rule 6 can be used by the court to allow petitioner liberal discovery to learn whether witnesses have died or whether other circumstances prejudicial to the state have occurred. Even if the petitioner should fail to overcome the presumption of prejudice to the state, he is not automatically barred from asserting his claim. As discussed previously, he may proceed if he neither knew nor, by the exercise of reasonable diligence, could have known of the grounds for relief.

The presumption of prejudice does not come into play if the time lag is not more than five years.

The time limitation should have a positive effect in encouraging petitioners who have knowledge of it to assert all their claims as soon after conviction as possible. The implementation of this rule can be substantially furthered by the development of greater legal resources for prisoners. See ABA Standards Relating to Post-Conviction Remedies, § 3.1, pp. 49-50 (Approved Draft, 1968).

Subdivision (a) does not constitute an abridgement or modification of a substantive right under 28 U.S.C. § 2072. There are safeguards for the hardship case. The rule provides a flexible standard for determining when a petition will be barred.

Subdivision (b) deals with the problem of successive habeas petitions. It provides that the judge may dismiss a second or successive petition (1) if it fails to allege new or different grounds for relief or (2) if new or different grounds for relief are alleged and the judge finds the failure of the petitioner to assert those grounds in a prior petition is inexcusable.

In Sanders v. United States, 373 U.S. 1 (1963), the court, in dealing with the problem of successive applications, stated:

> Controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on

the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application. [Emphasis added.]

373 U.S. at 15

The requirement is that the prior determination of the same ground has been on the merits. This requirement is in 28 U.S.C. § 2244(b) and has been reiterated in many cases since Sanders. See Gains v. Allgood, 391 F.2d 692 (5th Cir. 1968); Hutchinson v. Craven, 415 F.2d 278 (9th Cir. 1969); Brown v. Peyton, 435 F.2d 1352 (4th Cir. 1970).

With reference to a successive application asserting a new ground or one not previously decided on the merits, the court in Sanders noted:

> In either case, full consideration of the merits of the new application can be avoided only if there has been an abuse of the writ * * * and this the Government has the burden of pleading. * * *
>
> Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, * * * he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground.

373 U.S. at 17-18

Subdivision (b) has incorporated this principle and requires that the judge find petitioner's failure to have asserted the new grounds in the prior petition to be inexcusable.

Sanders, 18 U.S.C. § 2244, and subdivision (b) make it clear that the court has discretion to entertain a successive application.

The burden is on the government to plead abuse of the writ. See Sanders v. United States, 373 U.S. 1, 10 (1963); Dixon v. Jacobs, 427 F.2d 589, 596 (D.C.Cir.1970); cf. Johnson v. Copinger, 420 F.2d 395 (4th Cir. 1969). Once the government has done this, the petitioner has the burden of proving that he has not abused the writ. In Price v. Johnston, 334 U.S. 266, 292 (1948), the court said:

> [I]f the Government chooses * * * to claim that the prisoner has abused the writ of habeas corpus, it rests with the Government to make that claim with clarity and particularity in its return to the order to show cause. That is not an intolerable burden. The Government is usually well acquainted with the facts that are necessary to make such a claim. Once a particular abuse has been alleged, the prisoner has the burden of answering that allegation and of proving that he has not abused the writ.

Subdivision (b) is consistent with the important and well established purpose of habeas corpus. It does not eliminate a remedy to which the petitioner is rightfully entitled. However, in Sanders, the court pointed out:

> Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

There are instances in which petitioner's failure to assert a ground in a prior petition is excusable. A retroactive change in the law and newly discovered evidence are examples. In rare instances, the court may feel a need to entertain a petition alleging grounds that have already been decided on the merits. Sanders, 373 U.S. at 1, 16. However, abusive use of the writ should be discouraged, and instances of abuse are frequent enough to require a means of dealing with them. For example, a successive application, already decided on the merits, may be submitted in the hope of getting before a different judge in multijudge courts. A known ground may be deliberately withheld in the hope of getting two or more hearings, or in the hope that delay will result in witnesses and records being lost. There are instances in which a petitioner will have three or four petitions pending at the same time in the same court. There are many hundreds of cases where the application is at least the second one by the petitioner. This subdivision is aimed at screening out the abusive petitions from this large volume, so that the more meritorious petitions can get quicker and fuller consideration.

The form petition, supplied in accordance with rule 2(c), encourages the petitioner to raise all of his available grounds in one petition. It sets out the most common grounds asserted so that these may be brought to his attention.

Some commentators contend that the problem of abuse of the writ of habeas corpus is greatly overstated:

> Most prisoners, of course, are interested in being released as soon as possible; only rarely will one inexcusably neglect to raise all available issues in his first federal application. The purpose of the "abuse" bar is apparently to deter repetitious applications from those few bored or vindictive prisoners * * *

83 Harv.L.Rev. at 1153-1154

See also ABA Standards Relating to Post-Conviction Remedies § 6.2, commentary at 92 (Approved Draft, 1968), which states: "The occasional, highly litigious prisoner stands out as the rarest exception." While no recent systematic study of repetitious applications exists, there is no reason to believe that the problem has decreased in significance in relation to the total number of § 2254 petitions filed. That number has increased from 584 in 1949 to 12,088 in 1971. See Director of the Administrative Office of the United States Courts, Annual Report, table 16 (1971). It is appropriate that action be taken by rule to allow the courts to deal with this problem, whatever its specific magnitude. The bar set up by subdivision (b) is not one of rigid application, but rather is within the discretion of the courts on a case-by-case basis.

If it appears to the court after examining the petition and answer (where appropriate) that there is a high probability that the petition will be barred under either subdivision of rule 9, the

court ought to afford petitioner an opportunity to explain his apparent abuse. One way of doing this is by the use of the form annexed hereto. The use of a form will ensure a full airing of the issue so that the court is in a better position to decide whether the petition should be barred. This conforms with Johnson v. Copinger, 420 F.2d 395 (4th Cir. 1969), where the court stated:

> [T]he petitioner is obligated to present facts demonstrating that his earlier failure to raise his claims is excusable and does not amount to an abuse of the writ. However, it is inherent in this obligation placed upon the petitioner that he must be given an opportunity to make his explanation, if he has one. If he is not afforded such an opportunity, the requirement that he satisfy the court that he has not abused the writ is meaningless. Nor do we think that a procedure which allows the imposition of a forfeiture for abuse of the writ, without allowing the petitioner an opportunity to be heard on the issue, comports with the minimum requirements of fairness.
>
> 420 F.2d at 399

Use of the recommended form will contribute to an orderly handling of habeas petitions and will contribute to the ability of the court to distinguish the excusable from the inexcusable delay or failure to assert a ground for relief in a prior petition.

APPENDIX E

Rule 9(a), Rules Governing Section 2255 Proceedings, 28 USC foll. § 2255

Advisory Committee Note

Unlike the statutory provisions on habeas corpus (28 U.S.C. §§ 2241-2254), § 2255 specifically provides that "a motion for such relief may be made at any time." [Emphasis added.] Subdivision (a) provides that delayed motions may be barred from consideration if the government has been prejudiced in its ability to respond to the motion by the delay and the movant's failure to seek relief earlier is not excusable within the terms of the rule. Case law, dealing with this issue, is in conflict.

Some courts have held that the literal language of § 2255 precludes any possible time bar to a motion brought under it. In Heflin v. United States, 358 U.S. 415 (1959), the concurring opinion noted:

> The statute [28 U.S.C. § 2255] further provides; "A motion * * * may be made at any time." This * * * simply means that, as in habeas corpus, there is no statute of limitations, no res judicata, and that the doctrine of laches is inapplicable.

358 U.S. at 420

McKinney v. United States, 208 F.2d 844 (D.C.Cir. 1953) reversed the district court's dismissal of a § 2255 motion for being too late, the court stating:

> McKinney's present application for relief comes late in the day:

he has served some fifteen years in prison. But tardiness is irrelevant where a constitutional issue is raised and where the prisoner is still confined.

208 F.2d at 846, 847

In accord, see: Juelich v. United States, 300 F.2d 381, 383 (5th Cir. 1962); Conners v. United States, 431 F.2d 1207, 1208 (9th Cir. 1970); Sturrup v. United States, 218 F.Supp. 279, 281 (E.D.N.Car. 1963); and Banks v. United States, 319 F.Supp. 649, 652 (S.D.N.Y. 1970).

It has also been held that delay in filing a § 2255 motion does not bar the movant because of lack of reasonable diligence in pressing the claim.

The statute [28 U.S.C. § 2255], when it states that the motion may be made at any time, excludes the addition of a showing of diligence in delayed filings. A number of courts have considered contentions similar to those made here and have concluded that there are no time limitations. This result excludes the requirement of diligence which is in reality a time limitation.

Haier v. United States, 334 F.2d 441, 442 (10th Cir. 1964)

Other courts have recognized that delay may have a negative effect on the movant. In Raines v. United States, 423 F.2d 526 (4th Cir. 1970), the court stated:

[B]oth petitioners' silence for extended periods, one for 28 months and the other for nine years, serves

to render their allegations less believable. "Although a delay in filing a section 2255 motion is not a controlling element * * * it may merit some consideration * * *."

423 F.2d at 531

In Aiken v. United States, 191 F.Supp. 43, 50 (M.D.N.Car. 1961) aff'd 296 F.2d 604 (4th Cir. 1961), the court said: "While motions under 28 U.S.C. § 2255 may be made at any time, the lapse of time affects the good faith and credibility of the moving party." For similar conclusions, see: Parker v. United States, 358 F.2d 50, 54 n. 4 (7th Cir. 1965), cert. denied, 386 U.S. 916 (1967); Le Clair v. United States, 241 F.Supp. 819, 824 (N.D.Ind. 1965); Malone v. United States, 299 F.2d 254, 256 (6th Cir. 1962), cert. denied, 371 U.S. 863 (1962); Howell v. United States, 442 F.2d 265, 274 (7th Cir. 1971); and United States v. Wiggins, 184 F.Supp. 673, 676 (D.C.Cir. 1960).

There have been holdings by some courts that a delay in filing a § 2255 motion operates to increase the burden of proof which the movant must meet to obtain relief. The reasons for this, as expressed in United States v. Bostic, 206 F.Supp. 855 (D.C.Cir. 1962), are equitable in nature.

> Obviously, the burden of proof on a motion to vacate a sentence under 28 U.S.C. § 2255 is on the moving party. . . . The burden is particularly heavy if the issue is one of fact and a long time has elapsed since the trial of the case. While neither the statute of limitations nor laches can bar the assertion of

a constitutional right, nevertheless, the passage of time may make it impracticable to retry a case if the motion is granted and a new trial is ordered. No doubt, at times such a motion is a product of an afterthought. Long delay may raise a question of good faith.

206 F.Supp. at 856-857

See also United States v. Wiggins, 184 F.Supp. at 676.

A requirement that the movant display reasonable diligence in filing a § 2255 motion has been adopted by some courts dealing with delayed motions. The court in United States v. Moore, 166 F.2d 102 (7th Cir. 1948), cert. denied, 334 U.S. 849 (1948), did this, again for equitable reasons.

> [W]e agree with the District Court that the petitioner has too long slept upon his rights. * * * [A]pparently there is no limitation of time within which * * * a motion to vacate may be filed, except that an applicant must show reasonable diligence in presenting his claim. * * *
>
> The reasons which support the rule requiring diligence seem obvious. * * * Law enforcement officials change, witnesses die, memories grow dim. The prosecuting tribunal is put to a disadvantage if an unexpected retrial should be necessary after long passage of time.

166 F.2d at 105

In accord see Desmond v. United States, 333 F.2d 378, 381 (1st Cir. 1964), on remand, 345 F.2d 225 (1st Cir. 1965).

One of the major arguments advanced by the courts which would penalize a movant who waits an unduly long time before filing a § 2255 motion is that such delay is highly prejudicial to the prosecution. In Desmond v. United States, writing of a § 2255 motion alleging denial of effective appeal because of deception by movant's own counsel, this court said:

> [A]pplications for relief such as this must be made promptly. It will not do for a prisoner to wait until government witnesses have become unavailable as by death, serious illness or absence from the country, or until the memory of available government witnesses has faded. It will not even do for a prisoner to wait any longer than is reasonably necessary to prepare appropriate moving papers, however inartistic, after discovery of the deception practiced upon him by his attorney.

333 F.2d at 381

In a similar vein are United States v. Moore and United States v. Bostic, supra, and United States v. Wiggins, 184 F.Supp. at 676.

Subdivision (a) provides a flexible, equitable time limitation based on laches to prevent movants from withholding their claims so as to prejudice the government both in meeting the allegations of the motion and in any possible retrial. It includes a reasonable

diligence requirement for ascertaining possible grounds for relief. If the delay is found to be excusable, or nonprejudicial to the government, the time bar is inoperative.

Subdivision (b) is consistent with the language of § 2255 and relevant case law.

The annexed form is intended to serve the same purpose as the comparable one included in the § 2255 rules.

For further discussion applicable to this rule, see the advisory committee note to rule 9 of the § 2254 rules.